

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOEL RICHARDS, AND
CHERYL RICHARDS,

Plaintiffs,

V.

OFFICER CHAD JANIS,
OFFICER CHAD URWIN,
OFFICER M. LEE,
OFFICER IRA CAVIN, AND
CITY OF YAKIMA,

Defendants.

NO. CV-06-3064-EFS

**ORDER DENYING DEFENDANTS OFFICER
CAVIN AND CITY OF YAKIMA'S MOTION
FOR PARTIAL SUMMARY JUDGEMENT**

On October 11, 2007, the Court held a hearing in the above-captioned matter. William D. Pickett appeared on behalf of Plaintiffs Joel A. Richards and Cheryl R. Richards. Robert L. Christie and Robert C. Tenney appeared on behalf of Defendants Chad Janis, Chad Urwin, M. Lee, and Ira Cavin. Helen A. Harvey and Robert C. Tenney appeared on behalf of Defendant City of Yakima. Before the Court was Defendants' Motion for Partial Summary Judgment. (Ct. Rec. 15.) After reviewing the submitted material and hearing oral argument, the Court was fully informed. For reasons stated below, the Court denies Defendants' Motion for Partial Summary Judgment.

11

11

I. Statement of Facts¹

2 On July 23, 2005, Defendants Joel and Cheryl Richards, husband and
3 wife, attended a Planned Parenthood street dance on North Front Street
4 in Yakima, Washington. According to Mr. Richards, he was "stone sober"
5 at the street dance. (Ct. Rec. 16, Ex. 1.) At some point in the evening
6 while dancing, Mr. Richards bumped into a woman behind him. *Id.* The
7 woman, who was holding a glass of wine, threw the wine into his face and
8 grabbed a full glass of beer from a bystander and threw the beer into his
9 face as well. *Id.* Mr. Richards stood stunned, asking, "What the hell
10 did you do that for?" *Id.* No other verbal or physical conduct occurred.

11 Someone notified the supervising police officers at the street dance
12 that an incident was in progress. Two police officers, Chad Janis and
13 Chad Urwin responded and picked up Mr. Richards by each arm, escorting
14 him off the dance floor towards the outer perimeter of the street dance
15 area near a business named Corday's. *Id.* As the two officers and
16 Mr. Richards neared Corday's, one officer let go of his arm. *Id.*
17 Mr. Richards turned to face the officer and asked "what did I do, what
18 are you doing this for?" *Id.* Mr. Richards asked for the officer's name

¹ In ruling on a motion for summary judgment, the Court must consider the facts and all reasonable inferences therefrom as contained in the submitted affidavits, declarations, exhibits, and depositions, in the light most favorable to the party opposing the motion. See *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1972) (*per curiam*). The following factual recitation was created under this standard.

1 and badge number but received no response. *Id.* Mr. Richards then asked
2 to speak to Esther Vasquez, a Yakima police officer. *Id.* Mr. Richards
3 and Officer Vasquez had children who attended school together. *Id.* The
4 two officers stated they did not know Ms. Vasquez. *Id.*

5 Mr. Richards looked to the ground. *Id.* Then, without warning, one
6 of the officers placed a handcuff on one of Mr. Richards' hands. The
7 other officer spun Mr. Richards to the ground and, while being spun, the
8 first officer handcuffed Mr. Richards' second hand. *Id.* A third
9 officer, Officer M. Lee, joined the scene. *Id.* The officers began
10 "roughing up" Mr. Richards. (Ct. Rec. 43.) One officer sat on
11 Mr. Richards' legs and elbowed Mr. Richards in the back. (Ct. Rec. 15,
12 Ex. 1.) Another officer pinned Mr. Richards with his knee placed on Mr.
13 Richards' upper back and, with his other knee, kneed Mr. Richards in the
14 ribs. (Ct. Rec. 44.) The third officer grabbed Mr. Richards' hair and
15 banged his head into the concrete sidewalk. *Id.* Bystanders began to see
16 a pool of blood near Mr. Richards' head. (Ct. Recs. 43, 44, 45, 47, &
17 48.) During this rough-up, Mr. Richards "did not resist in any way. He
18 was twisted like a pretzel. He clearly was hurting and in pain. The
19 gentleman did not make any effort to hit, punch, or kick back. The
20 gentleman lay limp on the ground after the attack." (Ct. Rec. 46.)
21 Mr. Richards only asked, repeatedly, "What are you doing this for, what
22 did I do, what did I do?," with no answer from the officers. (Ct. Rec.
23 16, Ex. 1.)

24 "Just when [a bystander] thought it couldn't get any worse, another
25 squad car came screeching around the corner and [Officer Ira Cavin]
26 jumped out and ran over to [Mr. Richards who was] on the ground and

1 pulled out a taser." (Ct. Rec. 44.) Officer Cavin fired the taser but
 2 missed and "the current hit the sidewalk a few inches from" Mr. Richards'
 3 head. *Id.* Officer Cavin returned to the squad car, reloaded his taser,
 4 stood above Mr. Richards' head, and fired the taser into Mr. Richards'
 5 back. (Ct. Rec. 16, Ex. 1.) The taser was in "drive-stun mode," set to
 6 50,000 volts. (Ct. Rec. 37.) An officer then kicked Mr. Richards three
 7 times "real-hard" in his right ribs. (Ct. Recs. 16, Ex. 1; 44; & 48.)

8 The officers noticed bystanders were attempting to take pictures.
 9 (Ct. Recs. 47 & 48.) Other bystanders were yelling "police brutality,"
 10 "the man [is being] hurt," and words to that effect. (Ct. Recs. 20,
 11 Ex. A; & 48.) The officers hauled Mr. Richards to the patrol car.
 12 Before putting Mr. Richards into the vehicle, the officers put
 13 Mr. Richards' head in the door jam and slammed the door. (Ct. Recs. 44
 14 & 45.) Mrs. Richards watched the entire event, sobbing, pleading with
 15 the officers to stop hurting Mr. Richards, and warning the officers that
 16 Mr. Richards had recently undergone surgery. (Ct. Recs. 45 & 47.)

17 The officers took Mr. Richards to the city jail. At the jail cell,
 18 Officer Cavin "plowed into the back of" Mr. Richards, smashing
 19 Mr. Richards face against the wall and leaving a "big old bloody mark."
 20 (Ct. Rec. 24, Ex. B-1: Richards Dep.) The officers then handcuffed one
 21 of Mr. Richards' arms, "let off a little bit, and did it again . . . ,
 22 leaving another big mark on the wall." *Id.* The totality of the
 23 officers' actions resulted in Mr. Richards suffering at least three
 24 broken ribs and likely many other injuries. (Ct. Rec. 16, Ex. 1.)

25 The foregoing facts, presented in the light most favorable to the
 26 Plaintiffs, are in dispute. According to the Defendants, the officers

were providing security to the Planned Parenthood party as off-duty, uniformed police. (Ct. Rec. 16.) Mr. Richards was intoxicated and resisted arrest. (Ct. Rec. 20, Ex. A.) Officers claim Mr. Richards, in resisting, assaulted the officers, a felony. (Ct. Rec. 15.) Officer Cavin was asked by the other officers to apply the taser, the taser was applied in a controlled manner and on direct contact to Mr. Richards' right shoulder blade, and the taser was used in accordance with Yakima Police policy. (Ct. Rec. 20, Ex. A.) When Mr. Richards was taken to jail, Officer Cavin admits pressing his arm against Mr. Richards' head against the jail cell wall (Ct. Rec. 25, Ex. B-2: Cavin Dep.), but Defendants state Mr. Richards banged his head against the wall several times on his own volition. (Ct. Rec. 20, Ex. A.)

Mr. and Mrs. Richards brought suit against Officers Janis, Urwin, Lee, and Cavin, and the City of Yakima. Plaintiffs claim Defendants (1) violated their Constitutional search and seizure rights, (2) caused loss of physical liberty, and (3) caused physical pain and suffering and severe emotional trauma and suffering. Plaintiffs' relief arises under 42 U.S.C. § 1983, state constitutional and statutory violations, and negligence.

II. Analysis

In support of Officer Cavin and the City of Yakima's Motion for Partial Summary Judgment, Defendants argue Officer Cavin's taser use and use of force were reasonable under Fourth Amendment analysis and, in any case, qualified immunity protects Officer Cavin from suit. Additionally, Defendants argue the City cannot be held liable for each of the officers' actions under the doctrine of *respondeat superior* and the City cannot be

1 held liable under alternative theories of liability, including official
2 policy, acts or omissions fairly attributable to, and deliberate
3 indifference.

4 Summary judgment is appropriate where the documentary evidence
5 produced by the parties permits only one conclusion. *Anderson v. Liberty*
6 *Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). The party seeking summary
7 judgment must demonstrate there is an absence of disputed issues of
8 material fact to be entitled to judgment as a matter of law. FED. R. CIV.
9 P. 56(c). In other words, the moving party has the burden of showing
10 no reasonable trier of fact could find other than for the moving party.
11 *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). "A material issue
12 of fact is one that affects the outcome of the litigation and requires
13 a trial to resolve the parties' differing versions of the truth." *Lynn*
14 *v. Sheet Metal Worker's Int'l Ass'n*, 804 F.2d 1472, 1483 (9th Cir. 1986)
15 (quoting *Admiralty Fund v. Hugh Johnson & Co.*, 677 F.2d 1301, 1306 (9th
16 Cir. 1982)). The court is to view the facts and draw inferences in the
17 manner most favorable to the non-moving party. *Anderson*, 477 U.S. at
18 255; *Chaffin v. United States*, 176 F.3d 1208, 1213 (9th Cir. 1999).

19 A burden is also on the party opposing summary judgment to provide
20 sufficient evidence supporting his claims to establish a genuine issue
21 of material fact for trial. *Anderson*, 477 U.S. at 252; *Chaffin*, 186 F.3d
22 at 1213. "[A] mere 'scintilla' of evidence will be insufficient to
23 defeat a properly supported motion for summary judgment; instead, the
24 nonmoving party must introduce some 'significant probative evidence
25 tending to support the complaint.'" *Fazio v. City & County of San*

1 *Francisco*, 125 F.3d 1328, 1331 (9th Cir. 1997) (quoting *Anderson*, 477
 2 U.S. at 249, 252).

3 **A. Whether Officer Cavin's Taser Use Was Reasonable**

4 Section 1983 provides a cause of action against persons acting under
 5 color of state law who have violated rights guaranteed by the U.S.
 6 Constitution or federal statutes. 42 U.S.C. § 1983²; *Buckley v. City of*
 7 *Redding*, 66 F.3d 188, 190 (9th Cir. 1995). Here, there is no
 8 disagreement that each of the officers acted under color of state law as
 9 off-duty, uniformed police officers at the Planned Parenthood street
 10 dance. Instead, Defendant Officer Cavin argues his taser use was
 11 objectively reasonable and, therefore, did not violate a federal
 12 constitutional or statutory right.

13 The central question, therefore, is whether Officer Cavin's conduct
 14 deprived Mr. Richards of his Fourth Amendment right to be free from
 15 unreasonable seizure. In determining whether police action was
 16 reasonable, the court must carefully balance "'the nature and quality of
 17 the intrusion on the individual's Fourth Amendment interests' against the
 18 countervailing governmental interests at stake." *Graham v. Connor*, 490

19
 20 ² Section 1983 provides:

21
 22 Every person who, under color of any statute,
 23 ordinance, regulation, custom, or usage, of any
 24 State . . . , or causes to be subjected, any
 25 citizen . . . to the deprivation of any rights,
 26 privileges, or immunities secured by the
 Constitution and laws, shall be liable to the party
 injured in an action at law, suit in equity, or
 other proper proceeding for redress

42 U.S.C. § 1983.

1 U.S. 386, 396 (1989) (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985));
2 also citing *United States v. Place*, 462 U.S. 696, 703 (1983)). For the
3 first half of the balancing test, the court is to determine the "quantum
4 of force used." *Chew v. Gates*, 27 F.3d 1432, 1441 (9th Cir. 1994). For
5 the second half of the balancing test, the court is to consider "[1] the
6 severity of the crime at issue, [2] whether the suspect poses an
7 immediate threat to the safety of the officers or others, and [3] whether
8 he is actively resisting arrest or attempting to evade arrest by flight."
9 *Graham*, 490 U.S. at 396 (citing *Garner*, 471 U.S. at 8-9).

10 The court must view the relevant events from the perspective of a
11 reasonable officer on the scene and must allow "for the fact that police
12 officers are often forced to make split-second judgements – in
13 circumstances that are tense, uncertain, and rapidly evolving – about the
14 amount of force that is necessary in a particular situation." *Graham*, 490
15 U.S. at 397. However, law enforcement does not enjoy the luxury of both
16 interpreting perspective and circumstance in its favor. On summary
17 judgment, all facts and inferences must be viewed in favor of the
18 non-moving party. *Anderson*, 477 U.S. at 255. Thus, although the Court
19 must view the circumstances from that of a reasonable officer, the
20 circumstances are defined by the facts most favorable to Plaintiffs.

21 The facts before the Court demonstrate a genuine dispute over
22 whether Officer Cavin's actions were reasonable. When Officer Cavin
23 fired his taser, Mr. Richards was handcuffed, lying on the ground,
24 already subject to substantial physical force from the other three
25 officers, and physically hurt. Several bystanders were pleading for the
26 police officers to stop their actions. One witness characterized Officer

1 Cavin's conduct as "screeching around the corner in a squad car,"
2 jumping out, and firing two rounds of taser shock at Mr. Richards.
3 Officer Cavin fired the second taser shot standing above Mr. Richards'
4 head down into his back. Far from the "tense, uncertain, and rapidly
5 evolving" events imagined by *Graham*, 490 U.S. at 397, the officers
6 "strutted about waiving cuffs and stun guns" (Ct. Rec. 43), were
7 "completely arrogant, overly pumped up and out of control" (Ct. Rec. 46),
8 were "feeding upon their own frenzy [and] macho behavior" (Ct. Rec. 43),
9 and "continued to get more worked up by the minute," *id.* Three
10 declarants stated the officers "bragged and boasted" (Ct. Rec. 44),
11 "seemed proud of their abusive behavior" (Ct. Rec. 47), and "act[ed] so
12 cocky and proud" (Ct. Rec. 48).

13 Plaintiff's expert in police conduct, D. P. Van Blaricom,³ stated
14 tasering a handcuffed suspect, whether resisting or not, is almost never
15 acceptable. Tasering a non-resisting suspect is even more unacceptable.
16 The National Law Enforcement Policy Center's model policy on Electronic
17 Control Weapons states, "[t]he device is prohibited from being used . . .
18 on a handcuffed/secured prisoner, absent overtly assaultive behavior that
19 cannot be reasonably dealt with in any other less intrusive fashion."
20 (Ct. Rec. 37, Ex. D.) Mr. Blaricom concluded, based on his review of the

22 ³ Mr. Blaricom served as a police officer for 49 years, including
23 the last eleven as the Chief of Police in Bellevue, Washington.
24 Mr. Blaricom has taught and trained law enforcement officers in numerous
25 settings and has written over twenty articles for various law enforcement
26 publications.

1 facts in this case, Officer Cavin's taser use "constituted objectively
2 unreasonable excessive force." (Ct. Rec. 37.)

3 The government's countervailing interests at stake were minimal when
4 the facts are taken in Plaintiffs' favor. Mr. Richards bumped into a
5 woman while dancing. Mr. Richards has not been charged or convicted of
6 assaulting a police officer. Mr. Richards was not a threat to others.
7 Mr. Richards was not resisting arrest in any manner. Mr. Richards never
8 attempted to flee.

9 Defendant Officer Cavin argues his taser use was reasonable because
10 it complied with the Yakima Police Department's taser policy, which
11 provides: "Extra caution shall be given when considering use of a Taser
12 on the following individuals: juveniles under 16 years of age, pregnant
13 females, elderly subjects, handcuffed persons, and persons in elevated
14 positions." (Ct. Rec. 3, Ex. 1.) Yakima Police Chief Granato stated that
15 the policy against tasering handcuffed persons only applied to persons
16 that are standing to prevent them from injury in case of a fall. (Ct.
17 Rec. 3 ¶ 4.) However, whether Officer Cavin fully complied with the
18 Department's taser policy is irrelevant. The only inquiry is whether a
19 reasonable officer would know that tasering an unarmed, non-resisting,
20 handcuffed suspect would violate the suspect's constitutional rights.

21 For these reasons, the Court concludes there is a genuine issue of
22 material fact regarding whether Officer Cavin used reasonable force when
23 applying the taser and deprived Mr. Richards of his Fourth Amendment
24 right to be free from unreasonable seizure. Accordingly, Defendant
25 Cavin's motion is denied in part.

26 //

1 **B. Whether Officer Cavin's Use of Force in Jail Was Reasonable**

2 Defendants' Motion for Partial Summary Judgment sought "to have the
3 § 1983 claims against the City of Yakima and Officer Cavin dismissed as
4 a matter of law." (Ct. Rec. 15, p. 3.) Plaintiffs' complaint includes
5 an allegation that "[w]hile in custody, Mr. Richards was further attacked
6 by Police Officers who violently smashed his head into the wall of his
7 holding cell while he was handcuffed." (Ct. Rec. 1 ¶ 13.) In response
8 to Defendants' motion, Mr. Richards identified the principal officer
9 conducting the smashing as Officer Cavin. (Ct. Rec. 22, pp. 2-3.) The
10 identification was made possible by a deposition of Officer Cavin who
11 admitted pinning Mr. Richards against the jail cell wall. (Ct. Rec. 25,
12 Ex. B-2.) Despite Defendants' broad scope of requested relief with
13 respect to Officer Cavin, Defendants' memorandum did not seek summary
14 judgment for Officer Cavin's actions other than the taser use. After
15 argument at the hearing, Defendants requested the Court grant summary
16 judgment regarding Officer Cavin's actions in the jail cell. After
17 viewing the submitted evidence in the light most favorable to Plaintiffs,
18 the Court concludes Plaintiffs established sufficient evidence (Ct. Rec.
19 24, Ex. B-1; Ct. Rec. 25, Ex. B-2), demonstrating a genuine issue of
20 material fact as to whether Officer Cavin's use of force in the jail cell
21 was reasonable.

22 **C. Whether Officer Cavin is Entitled to Qualified Immunity**

23 Defendant Officer Cavin argues he is entitled to qualified immunity.
24 "Qualified immunity operates . . . to protect officers from the sometimes
25 'hazy border between excessive and acceptable force' . . . and to ensure
26 that before they are subjected to suit, officers are on notice their

1 conduct is unlawful." *Saucier v. Katz*, 533 U.S. 194, 206 (2001)
 2 (citations omitted). "Government officials performing discretionary
 3 functions are shielded from liability for civil damages insofar as their
 4 conduct does not violate clearly established statutory or Constitutional
 5 rights of which a reasonable person would have known." *Harlow v.*
 6 *Fitzgerald*, 457 U.S. 800, 818 (1982). According to *Saucier*, a government
 7 official is not entitled to qualified immunity if the facts alleged,
 8 taken in the light most favorable to the party asserting injury,
 9 demonstrate that the officer's conduct violated a constitutional right
 10 and the right was sufficiently clear that a reasonable officer would
 11 understand that what his doing violates that right. *Saucier*, 533 U.S.
 12 at 201; see also *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *Smith*
 13 *v. City of Hemet*, 394 F.3d 689, 702 (9th Cir. 2005) (en banc).

14 "Whether the right at issue in a claim of qualified immunity is
 15 clearly established is judged as of the date of the incident alleged and
 16 is a pure question of law." *Phillips v. Hust*, 477 F.3d 1070, 1079 (9th
 17 Cir. 2007). The exact conduct need not have been previously ruled
 18 unconstitutional. "[I]f the defendants' conduct is so patently violative
 19 of the constitutional right that reasonable officials would know without
 20 guidance from the courts' that the action was unconstitutional, closely
 21 analogous pre-existing case law is not required to show that the law is
 22 clearly established." *Mendoza v. Block*, 27 F.3d 1357, 1361 (9th Cir.
 23 1994) (quoting *Casteel v. Pieschek*, 3 F.3d 1050, 1053 (7th Cir. 1993)).

24 The Court finds no published case factually similar to the instant
 25 matter. However, prior to Officer Cavin's conduct, the Ninth Circuit has
 26 repeatedly recognized that "the use of force on a subdued arrestee was

1 unreasonable." *Mendoza v. Block*, 27 F.3d 1357, 1362 (9th Cir. 1994); see
 2 also *Watkins v. City of Oakland*, 145 F.3d 1087, 1090 (9th Cir. 1998).
 3 Therefore, the Court holds that the law at the time of Officer Cavin's
 4 conduct clearly established that a taser must not be used against a
 5 non-resisting individual. At this stage, Defendant Cavin's motion for
 6 qualified immunity is denied. The jury will need to determine what
 7 conduct Officer Cavin engaged in.

8 **D. Whether the Evidence Supports § 1983 Claims Against the City**

9 Defendant City of Yakima argues that no evidence in the record
 10 demonstrates an unconstitutional "official policy or custom" serving as
 11 the moving force behind the officers' use of force against Mr. Richards.⁴
 12 A municipality cannot be held liable under 42 U.S.C. § 1983 on the
 13 doctrine of *respondeat superior*, and can only be held liable under § 1983
 14 when the execution of a government's unconstitutional policy or custom
 15 inflicts an injury. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

16 A practice is a "custom" only if it is "so persistent and widespread
 17 that it constitutes a permanent and well settled city policy." *Trevino*
 18

19 ⁴ Defendant City of Yakima does not seek summary judgment on
 20 Plaintiffs' state law tort causes of action. In Washington,
 21 municipalities may be held liable for the actions of their police
 22 officers under the doctrine of *respondeat superior*, so long as the
 23 officer's actions fall within the scope of employment. *Vallendorff v.*
 24 *United States*, 951 F.2d 215, 218 (9th Cir. 1991); see also *Leuthold v.*
 25 *Goodman*, 22 Wash. 2d 583 (1945).

1 *v. Gates*, 99 F.3d 911, 918 (9th Cir.1996) (internal quotation marks
2 omitted); *Gillette v. Delmore*, 979 F.2d 1342, 1349 (9th Cir. 2002).
3 Generally, a policy or custom cannot be based on a single occurrence of
4 an unconstitutional action or incident, *Navarro v. Block*, 72 F.3d 712,
5 714 (9th Cir. 1996); however, in some circumstances, liability can be
6 imposed upon a municipality for a single decision by municipal
7 policymakers, especially those such as a sheriff or a police chief. See
8 *Larez v. City of Los Angeles*, 946 F.2d 630 (9th Cir. 1991).

9 Municipal liability may also be established where evidence
10 demonstrates the municipality has ratified an employee's action, creating
11 a *de facto* governmental policy or custom. See *City of St. Louis v.*
12 *Praprotnik*, 485 U.S. 112 (1988); *Larez*, 946 F.2d at 646; *Fuller v. City*
13 *of Oakland*, 47 F.3d 1522 (9th Cir. 1995); *Fundiller v. City of Cooper*
14 *City*, 777 F.2d 1436 (11th Cir. 1985).

15 Plaintiffs presented sufficient evidence to establish a genuine
16 issue of material fact as to whether the City of Yakima had a policy or
17 custom serving as the moving force behind Officer Cavin's taser usage.
18 As stated earlier, the Yakima Police Department's taser policy provides
19 in pertinent part: "Extra caution shall be given when considering use of
20 a Taser on the following individuals: juveniles under 16 years of age,
21 pregnant females, elderly subjects, handcuffed persons, and persons in
22 elevated positions." (Ct. Rec. 3, Ex. 1.) Chief Granato interpreted the
23 Department's taser policy as allowing tasering suspects who are
24 handcuffed as long as they are not standing. (Ct. Rec. 20, Ex. A.)
25 Officer Cavin cannot recall any YPD restrictions on tasering handcuffed
26 individuals and, in fact, used his taser on two prior occasions

1 (1) firing a probe into a dog on July 12, 2005, and (2) stunning a
2 handcuffed individual on July 21, 2005.⁵ (Ct. Rec. 37 ¶ 16.) By
3 contrast, the National Law Enforcement Policy Center's model policy
4 prohibits tasering a handcuffed prisoner "absent overtly assaultive
5 behavior." (Ct. Rec. 37, Ex. D.)

6 Based on Officer Cavin's taser usage history, the Department's
7 apparent acquiescence to Officer Cavin's taser usage, and the
8 Department's broad taser policy, the Court concludes a genuine issue of
9 material fact exists regarding whether the Department had a well-settled
10 policy serving as the moving force behind Officer Cavin's taser use.

11 There is also evidence the City of Yakima ratified the officers'
12 conduct toward Mr. Richards. Yakima Detective Fehrer received
13

14 ⁵ After the taser use on Mr. Richards on July 23, 2005, Officer
15 Cavin also stunned a handcuffed individual on June 3, 2006; fired probes
16 into an emotionally disturbed suspect on July 21, 2006; fired probes into
17 an unknown man who refused to drop a stick on July 31, 2006; and fired
18 probes into a suspected unruly child who had walked away from him on
19 September 4, 2006. The Department has found each of these incidents
20 within the Department's taser policy. The parties did not brief whether
21 subsequent events establish that the Department had a policy condoning
22 improper taser usage as of July 23, 2005. The Court concludes it need
23 not resolve this question at this stage because even without the
24 subsequent taser use there is sufficient evidence to create a genuine
25 issue of material fact as to the existence of a policy allowing improper
26 taser use.

1 statements of eye witnesses Mick Edvalson, Carli Edvalson, Jennifer
2 Sharp, Sherrie Mathers, Tammie West, and Mike Fairbairn. Declarations
3 of these witnesses to this Court stated Mr. Richards never resisted
4 arrest and the officers' conduct was generally abhorrent. Nevertheless,
5 Detective Fueherer did not request an internal investigation and did not
6 give the witness statements to the prosecuting attorney. (Ct. Rec. 26,
7 Ex. B-5, p. 75-77.) Failure to conduct an internal investigation
8 demonstrates the Department may condone or has ratified the officers'
9 conduct. *Bordonaro v. McLeod*, 871 F.2d 1151, 1155-63 (1st Cir. 1989);
10 *Spell v. McDaniel*, 824 F.2d 1380 (4th Cir. 1987). For this reason, the
11 Court also concludes a genuine issue of material fact exists regarding
12 whether the Department has ratified the officers' conduct.

III. Conclusion

14 The Court denies Defendant's Motion for Partial Summary Judgment in
15 whole. There are genuine issues of material fact regarding whether
16 Officer Cavin's taser use was reasonable, whether Officer Cavin is
17 entitled to qualified immunity, and whether the City of Yakima condones
18 or has ratified the officers' conduct through its taser policy and other
19 unwritten general policy.

20 Accordingly, **IT IS HEREBY ORDERED:** Defendants's Motion for Partial
21 Summary Judgment (**Ct. Rec. 15**) is **DENIED**.

22 **IT IS SO ORDERED.** The District Court Executive is directed to enter
23 this Order and to provide copies to all counsel.

24 ||| **DATED** this 17th day of October 2007.

S/ Edward F. Shea
EDWARD F. SHEA
United States District Judge